

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES EDWARD LEPP,

Defendant.

No. CR 04-00317 WHA
No. C 12-05836 WHA

**ORDER DENYING
SECTION 2255 MOTION**

INTRODUCTION

Defendant has moved to vacate, set aside, or correct his conviction, judgment, and sentence under Section 2255 and has requested an evidentiary hearing. The motion is **DENIED**. There is no need for an evidentiary hearing.

STATEMENT

Defendant Charles Edward Lepp, proceeding pro se, has filed a motion to vacate, set aside, or correct his sentence for one count of conspiracy to possess with intent to distribute and distribution of marijuana in violation of 21 U.S.C. 846 and one count of manufacturing and possession with intent to distribute and distribution of marijuana in violation of 21 U.S.C. 841(a)(1). Judge Marilyn Hall Patel presided over defendant's criminal proceedings, including pre-trial motions, trial, and sentencing. The undersigned judge received this matter by way of reassignment.

On March 2, 2005, defendant Lepp was indicted and charged with conspiracy to possess with intent to distribute 1,000 plants or more of marijuana in violation of 21 U.S.C. 846 (count

one), manufacturing and possessing with intent to distribute marijuana in violation of 21 U.S.C. 841(a)(1) (counts two through four), and maintaining a premises for manufacturing a controlled substance in violation of 21 U.S.C. 856(a)(1) (counts five and six). As a result of a number of pretrial rulings, defendant was tried on only two counts: (1) conspiracy to possess with intent to distribute marijuana and (2) manufacture and possession of marijuana with intent to distribute. Following a jury trial, the jury returned a guilty verdict on both counts, further finding that both counts involved 1,000 or more marijuana plants. Pursuant to the statutory mandatory minimum, defendant was sentenced to a ten-year term of imprisonment and five years of supervised release. Defendant is currently in custody, with a projected release date of January 13, 2018 (Opp. 1).

During pretrial proceedings, defendant was represented by a number of different attorneys. After replacing defendant's previously retained counsel on March 22, 2005, Attorney J. Tony Serra represented defendant pro bono. Attorneys Omar Figueroa and Shari Greenberger assisted at Attorney Serra's direction, also on a pro bono basis. Due to Attorney Serra's impending incarceration in 2006, Attorney Serra was excused. In January 2006, Attorneys Figueroa and Greenberger moved to withdraw as counsel on the ground that Attorney Serra was defendant's counsel of choice and defendant did not wish to proceed with Attorneys Figueroa and Greenberger (Dkt. No. 106). Federal Public Defender Shawn Halbert was then substituted as counsel. Prior to trial, Attorney Michael Hinckley replaced Attorney Halbert as CJA counsel in February 2007. Attorney Hinckley then represented defendant through the remaining pre-trial proceedings, trial, and sentencing.

1. PRE-TRIAL MOTIONS.

A. Motions Based on the Religious Freedom Restoration Act.

Before trial, defendant filed a number of motions based on the Religious Freedom Restoration Act ("RFRA"), contending that he was a practicing Rastafarian and that marijuana use was a necessary component of his religious practices. For example, in May 2005, Attorney Serra filed a motion to modify defendant's bail conditions to permit the use of marijuana while on pretrial release. In September 2005, Attorneys Serra, Figueroa, and Greenberger filed a motion to quash the 2004 and 2005 search warrants and suppress all evidence seized pursuant to

1 those warrants. Attorney Halbert subsequently moved to suppress the evidence on the additional
2 ground that the search warrants violated RFRA, contending that the magistrate judge should
3 have been informed of the religious nature of his marijuana possession. Judge Patel rejected
4 defendant's argument that the warrants should be suppressed on the basis that they violated
5 RFRA (Dkt. No. 193). Attorney Hinckley then filed a motion for reconsideration of the order
6 denying the motion to suppress, which was denied (Dkt. Nos. 199 and 207). Judge Patel
7 quashed the 2004 search warrant but granted the government's motion to admit evidence found
8 in plain view during the 2004 search. Judge Patel also quashed the 2005 search warrant and
9 suppressed the fruits of the search executed pursuant to that warrant (Dkt. No. 207).

10 At a hearing on May 30, 2007, Attorney Hinckley raised the issue of presenting a RFRA
11 defense. Judge Patel expressed skepticism, stating that "the amount of marijuana that was seized
12 in this case was not consistent" with religious or sacramental use (Dkt. No. 302 at 7). Attorney
13 Hinckley then filed a written motion to present a RFRA defense at trial. In an eighteen-page
14 reasoned opinion, Judge Patel denied the motion (Dkt. No. 235). The order expressed concern
15 that the high number of individuals defendant claimed were members of his church was an
16 opportunistic fabrication. Attorney Hinckley then filed a motion for reconsideration attaching
17 declarations from defendant and Erica Womachka stating that there were 2500 church members,
18 each of whom grew marijuana for his or her own use on individual plots (Dkt. No. 236). The
19 motion for reconsideration was denied.

20 **B. Motion Regarding Outrageous Government Conduct.**

21 Attorney Hinckley moved to dismiss the indictment based on outrageous government
22 conduct related to a marijuana transaction the government set up after defendant was indicted
23 and represented by counsel (Dkt. No. 198). The motion was based on a transaction dated
24 January 19, 2005, in which a confidential government informant arranged to purchase one pound
25 of marijuana from defendant. Judge Patel denied the motion to dismiss the indictment, but found
26 that the undercover officer and informant who participated in the transaction had an "agency
27 relationship" with the government such that defendant could be induced to make incriminating
28 statements without the assistance of counsel (Dkt. No. 207 at 22). Judge Patel held that this

1 constituted a violation of the right to counsel discussed in *Massiah v. United States*, 377 U.S.
2 201, 207 (1964). While the *Massiah* violation precluded the government from introducing
3 evidence of the January 2005 sale charged in the original indictment, Judge Patel held the
4 evidence was admissible as related to the “newly added distribution charge in the superseding
5 2005 indictment.” Therefore, the counts arising from the undercover operation were severed
6 (Dkt. No. 207 at 22–23).

7 **2. EVIDENCE PRESENTED AT TRIAL.**

8 The trial proceeded on counts one and two of the superseding indictment, namely
9 conspiracy to possess with intent to distribute and manufacture and possession with intent to
10 distribute based on the approximately 25,000 marijuana plants found on defendant’s property
11 during the search conducted on August 18, 2004.

12 During jury voir dire, Judge Patel instructed the panel that medical marijuana and
13 religious marijuana were not defenses to the charges in the case. Specifically, the judge stated:

14 [Y]ou should understand that we’re in federal court, and that
15 the whole notion of medical marijuana, which is accepted
16 under state law, or religious marijuana, are not at issue in this
case. They’re not defenses in this case.

17 (Dkt. No. 244 at 61–62).

18 **A. The Government’s Case.**

19 The parties stipulated that there were 24,784 marijuana plants seized by federal DEA
20 agents from defendant’s land on August 18, 2004.

21 The government presented the testimony of Dave Garzoli, a detective with the Lake
22 County Sherriff’s Office. Officer Garzoli testified that he had received reports about a large
23 marijuana growing operation. He then drove on California State Highway 20 in Upper Lake and
24 saw a large field filled with marijuana. Later, on August 9, 2004, he drove onto the site with
25 several other law enforcement officers, where they were confronted by several individuals. The
26 officers, who were in plainclothes, identified themselves as law enforcement and drew their
27 firearms. Several minutes later, defendant drove up and “took command of the situation,” asking
28 the officers what they were doing there (Dkt. No. 245 at 229). Defendant opined that there were

1 approximately 18,000 marijuana plants for 2400 “patients.” Other state law enforcement officers
2 who accompanied Officer Garzoli at the August 9 visit testified similarly.

3 **B. Defendant’s Case.**

4 Defendant called Smiley James Harris, Right Reverend for the Church of Greater Faith
5 and Redemption. Mr. Harris testified that he had an agreement with defendant allowing Mr.
6 Harris’ church to grow 250 marijuana plants on defendant’s land. According to Mr. Harris,
7 defendant only provided the land and did not direct or participate in the planting, growing, or
8 harvesting of those plants (Dkt. No. 246 at 319–20).

9 Defendant testified, stating that he was a minister for his church, “Eddy’s Medicinal
10 Gardens and Multidenominational Ministry of Cannabis and Rastafari.” He testified that the use
11 of marijuana is a key part of the Rastafarian faith. By August 2004, defendant and his wife
12 decided to allow medicinal marijuana patients and members of their church to grow marijuana
13 on their land. An individual could only participate if he or she had a valid California medical
14 marijuana identification card (*id.* at 350–51).

15 Defendant said he had no role in the cultivation other than in allowing others to use his
16 land (*id.* at 351). He denied ownership of the marijuana, stating that he did not plant, tend, or
17 harvest the plants (*id.* at 356). He claimed, however, that as leader and founder of the church, he
18 felt “responsible for all of the plants” (*id.* at 357). Defendant claimed to be a worldwide activist
19 for the legalization of cannabis hemp. Defendant testified that he had a number of physical
20 disabilities and ailments (*id.* at 356–57, 366–67).

21 After defendant’s direct examination and outside the jury’s presence, the government
22 requested leave to question defendant regarding two speeches he had previously made. The
23 government also sought to cross-examine defendant on the 2005 transaction involving the
24 confidential informant, previously excluded as a *Massiah* violation. Over the objections of
25 defense counsel, Judge Patel held that defendant had opened the door to such evidence because
26 such a sale was “inconsistent with . . . the overall tenor of his testimony” (*id.* at 372).

27 On cross-examination, defendant was asked about prior statements he had made
28 regarding the marijuana plants on his property. Defendant testified that he was responsible for

1 the plants, but that he was not physically involved in the planting or cultivation of the plants (*id.*
2 at 377). Defendant said that he was “very proud” of the marijuana (*id.* at 357, 377–78). When
3 questioned about the 2005 transaction involving the sale of one pound of marijuana to a
4 confidential informant, defendant stated that he repeatedly told the confidential informant that he
5 did not have any marijuana and denied being involved in any sale (*id.* at 386–88).

6 Defendant further testified that his wife, Linda, was in charge of the field, whereas
7 defendant just “stayed in the offices” (*id.* at 394).

8 C. The Government’s Rebuttal Case.

9 The government called DEA Special Agent Padgett, who had participated in the search
10 and seizure of marijuana plants from defendant’s land on August 18, 2004. Defendant had told
11 the agent that the fields and plants were all his. Defendant had said that his wife did not live
12 there and had “nothing to do with this” (*id.* at 420). Defendant had explained that plots of six to
13 25 plants were each owned by patients in exchange for a \$500 donation to his church (*id.* at 421).

14 The informant involved in the January 2005 transaction was called to testify. He had
15 previously worked as an informant with the DEA and state law enforcement. He testified that he
16 targeted defendant because he did not like him. After seeing an advertisement defendant placed
17 requesting information from an August 2004 seizure of defendant’s property, the informant came
18 up with a plan to offer defendant pictures from the seizure. The informant contacted the Lake
19 County Sheriff’s Office, which supplied him with pictures from the seizure and connected him
20 with the DEA. The informant testified that, after several phone calls and meetings, the informant
21 told defendant that his contact was interested in a marijuana transaction. At defendant’s house,
22 defendant showed the informant two large bags of marijuana and directed a young man at the
23 house to make the delivery to the contact, who was an undercover officer (*id.* at 475–76). The
24 informant rode back with the young man and watched him hand the undercover officer the
25 marijuana and receive cash in exchange.

26 The undercover officer for the January 2005 transaction, Sonoma County Narcotics
27 Detective Andrew Cash, testified. Detective Cash arranged the deal with defendant to buy one
28 pound of marijuana for \$2500 (*id.* at 509–10; 515). Defendant told the detective that “he himself

1 did not have any marijuana” because law enforcement had taken all of it, but was “acting as a
2 middleman” for the deal (*id.* at 524).

3 **3. JURY VERDICT AND SENTENCING.**

4 On September 2, 2008, the jury returned a guilty verdict on both counts, finding that both
5 counts involved 1,000 or more plants of marijuana. Defendant was sentenced on May 18, 2009.
6 Defense counsel contended that a two-level downward departure under the safety-valve
7 provision of U.S.S.G. Section 5C1.2 should apply, and that a further 18-level departure under 18
8 U.S.C. Section 3553(a) was warranted (Dkt. Nos. 274 and 276). Judge Patel determined that
9 defendant did not qualify for safety-valve relief (Dkt. No. 297 at 18–20). She stated that safety-
10 valve relief was not appropriate, given defendant’s lack of candor with the court throughout the
11 lengthy litigation and defendant’s admission that he was growing such a large quantity of plants
12 “proudly as the leader of this church” (*ibid.*). Defendant was sentenced to the statutory
13 mandatory minimum term of ten years in prison and five years of supervised release.

14 **4. POST-CONVICTION PROCEEDINGS.**

15 Defendant appealed his conviction and sentence to our court of appeals. On July 27,
16 2011, our court of appeals affirmed defendant’s conviction and sentence in an unpublished
17 decision, *United States v. Lepp*, 446 Fed. App’x. 44 (9th Cir. 2011). On November 28, 2011,
18 defendant’s petition for a writ of certiorari was denied. Defendant then filed the instant Section
19 2255 motion.

20 Defendant argues that his sentence should be vacated, set aside, or corrected because
21 defendant’s counsel provided ineffective assistance. Specifically, defendant asserts that
22 Attorney Hinckley was constitutionally ineffective on the grounds that he (1) failed to
23 investigate and effectively argue a defense under the RFRA, (2) failed to investigate alleged
24 outrageous government misconduct and successfully bring a motion to dismiss the indictment,
25 (3) failed to investigate and present evidence regarding defendant’s physical disabilities, (4)
26 failed to investigate and present evidence regarding the cultivation and ownership of the
27 marijuana by the 2500 members of defendant’s church, (5) failed to ensure that the government
28 deposed defendant’s wife, (6) failed to effectively object to the admission of prejudicial

1 testimony, and (7) failed to present evidence regarding eligibility for safety-valve relief.
2 Defendant also claims that his prior team of pro bono counsel, Attorneys Serra, Figueroa, and
3 Greenberger, provided incorrect and deficient advice in connection with defendant's decision to
4 reject a plea offer. Defendant further claims that the cumulative effects of counsel's ineffective
5 assistance prejudiced him. Defendant also claims that the convictions violate the prohibition
6 against double jeopardy. Finally, while the Section 2255 motion was pending, defendant filed a
7 motion seeking leave to amend the motion to include an additional claim that the Controlled
8 Substances Act violates his right to equal protection under the Fifth Amendment. *See Bolling v.*
9 *Sharpe*, 347 U.S. 497, 499–500 (1954); *see also Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal
10 protection analysis in the Fifth Amendment area is the same as that under the Fourteenth
11 Amendment.").

12 The order concludes that as to the claims for ineffective assistance of counsel, defendant
13 does not make a showing that either Attorney Hinckley or Attorneys Serra, Figueroa, and
14 Greenberger's representation rose to the level of being constitutionally deficient, in violation of
15 the Sixth Amendment. Nor is defendant entitled to relief on either his double jeopardy claim or
16 the equal protection claim. Thus, for the reasons stated below, defendant's motion is **DENIED**.

17 ANALYSIS

18 Section 2255 provides that:

19 A prisoner in custody under sentence of court established by
20 Act of Congress claiming the right to be released upon the
21 ground that the sentence was imposed in violation of the
22 Constitution or laws of the United States, or that the court was
23 without jurisdiction to impose such sentence, or that the
sentence was in excess of the maximum authorized by law, or
is otherwise subject to collateral attack, may move the court
which imposed the sentence to vacate, set aside or correct the
sentence.

24 The district court has the discretion to deny an evidentiary hearing on a Section 2255 motion
25 where the record conclusively shows that the defendant is not entitled to relief. The defendant
26 "need not detail his evidence, but must only make specific factual allegations which, if true,
27 would entitle him to relief." *United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998).
28 Our court of appeals has stated, however, that "conclusory allegations which are not supported

1 by a statement of specific facts do not warrant habeas relief.” *James v. Borg*, 24 F.3d 20, 26 (9th
2 Cir. 1994). Here, there is no need for an evidentiary hearing as there are no disputed factual
3 issues to be resolved bearing on the claims made in the instant motion.

4 The majority of defendant’s arguments in his Section 2255 motion are based on
5 ineffective assistance of counsel claims. To establish ineffective assistance of counsel, a
6 defendant must show: (1) counsel’s performance was deficient under the standards of reasonable
7 lawyering, *i.e.*, it “fell below an objective standard of reasonableness,” and (2) “there is a
8 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
9 would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

10 As to the first prong, there is a “strong presumption that counsel’s performance f[ell]
11 within the wide range of professional assistance.” *Kimmelman v. Morrison*, 477 U.S. 365, 381
12 (1986). Performance will fall outside the range of acceptable professional assistance if it falls
13 below “an objective standard of reasonableness,” as determined by the prevailing professional
14 norms. *Strickland*, 466 U.S. at 687–88. To prove prejudice under the second prong, a
15 “reasonable probability” is considered to be a probability sufficient to undermine confidence in
16 the outcome. *Id.* at 694. Where possible, the Supreme Court has recommended analysis of
17 ineffective assistance of counsel claims based on the second prong, stating “[t]he object of an
18 ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an
19 ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be
20 so, that course should be followed.” *Id.* at 697.

21 **1. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
22 **PLEA OFFER OR NEGOTIATION.**

23 Defendant contends that his counsel notified him of a verbal plea offer, by which the
24 government would agree to a sentence of eighteen months in prison, six months in a halfway
25 house, and six months in home confinement (Mot. at 20). Defendant’s counsel, however,
26 allegedly informed him that (1) a defense based on the Religious Freedom and Restoration Act
27 “was possible . . . and would probably succeed,” (2) the government’s case was “weak,” (3)
28 evidence from previous searches of defendant’s property could not be raised in his trial, and (4)
defendant “would probably” be sentenced to only thirty months if he was found guilty at trial

1 because he was eligible for safety-valve relief. Defendant claims that had his original counsel
2 provided “competent advice concerning his defense and potential sentence,” he would have
3 accepted the plea (*ibid.*). In his reply brief, defendant states that his “original counsel,” not trial
4 counsel, failed to properly advise him on whether to accept the government’s plea offer.

5 Because defendant’s briefs were unclear on this Section 2255 motion, defendant was
6 requested by the Court to submit a sworn affidavit clarifying the factual basis for his claim.
7 Defendant has now submitted a declaration sworn under penalty of perjury in response. The
8 facts set forth in defendant’s declaration regarding his rejection of the plea offer are as follows.
9 Judge Patel referred the parties to another judge for mediation (a review of the records in this
10 action indicates that a settlement conference did in fact take place before Magistrate Judge James
11 Larson on November 9, 2005 (Dkt. No. 92)). Attorneys Figueroa and Greenberger, then-counsel
12 for defendant, informed him of the deal offered by the government, as described above.
13 Defendant states that he “left the meeting and hearing telling them no, because [he] did not want
14 to leave [his] wife’s side in her last days,” as she was suffering from cancer (Lepp Decl. ¶ 4).
15 Attorneys Figueroa and Greenberger, as well as an attorney named “James,” discussed the plea
16 offer with defendant “over the next week or so.” According to defendant, the attorneys told him
17 “that it was the best deal [he] would get and encouraged [defendant] to take it” (*ibid.*).
18 Defendant did not want to take the plea offer because his former counsel, Attorney Serra, had
19 said he was sure they could win at trial. At the time he was considering the plea offer, defendant
20 was aware that Attorney Serra would not be available to try the case, as Attorney Serra was due
21 to be incarcerated for eighteen months on his own federal conviction. Attorneys Figueroa and
22 Greenberger advised defendant that the judge would not grant an eighteen-month continuance to
23 allow Attorney Serra to try the case, and further advised defendant that they were not confident
24 they could win at trial (*ibid.*). Defendant nevertheless chose to reject the plea offer.

25 “[T]he decision to reject a plea bargain offer and plead not guilty is also a vitally
26 important decision and a critical stage at which the right to effective assistance of counsel
27 attaches.” *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002) (quoting *United States v.*
28 *Zelinsky*, 689 F.2d 435, 438 (1982)). As to the performance prong, our court of appeals has

1 stated that for a defendant to establish a claim of ineffectiveness of counsel in a plea situation, he
2 “must demonstrate gross error on the part of counsel” *Turner*, 281 F.3d at 880 (quoting
3 *McMann v. Richardson*, 397 U.S. 759, 772 (1970)). The question is “not whether ‘counsel’s
4 advice [was] right or wrong, but . . . whether that advice was within the range of competence
5 demanded of attorneys in criminal cases.” *Ibid.* (quoting *McMann*, 397 U.S. at 771). As to the
6 prejudice prong, a defendant “must demonstrate a reasonable probability [he] would have
7 accepted the earlier plea offer had [he] been afforded effective assistance of counsel.” *Missouri*
8 *v. Frye*, — U.S. —, 132 S.Ct. 1399, 1409 (2012). The defendant must further demonstrate a
9 reasonable probability that the plea would have been entered, including that the trial court would
10 have accepted the plea agreement. *Ibid.* Based on the facts stated in defendant’s own sworn
11 statement, defendant is not entitled to relief on his claim that counsel provided ineffective
12 assistance in connection with his decision to reject a plea agreement. As discussed below,
13 defendant’s claim does not meet either prong of the *Strickland* test for ineffective assistance of
14 counsel.

15 *First*, defendant’s declaration establishes that his counsel at the time, Attorneys Figueroa
16 and Greenberger, affirmatively advised defendant to take the plea offer. Even if his prior
17 counsel, Attorney Serra, had expressed confidence regarding his ability to secure an acquittal for
18 defendant at trial, defendant was aware that Attorney Serra would not be available to try his case.
19 “Counsel cannot be required to accurately predict what the jury or court might find, but he can
20 be required to give the defendant the tools he needs to make an intelligent decision.” *Turner*,
21 281 F.3d at 881. Attorneys Figueroa and Greenberger informed defendant of the plea offer and
22 its terms, advised him that they were not confident defendant would prevail at trial, and urged
23 him to take the plea, advising him that it was the best deal he was likely to get (Lepp Decl. ¶ 4).
24 Defendant does *not* allege that he was unaware of the potential penalties that he could face if he
25 lost at trial; in fact, a review of the record demonstrates that defendant was informed of the
26 potential penalties at an arraignment hearing before Magistrate Judge Joseph Spero on March 3,
27 2005, including the ten-year mandatory minimum and maximum penalties (Dkt. No. 305).
28 Defendant cannot, therefore, establish that he received ineffective assistance of counsel in

1 connection with his plea agreement. Moreover, although he contends that Attorney Serra
2 provided ineffective assistance by expressing a positive assessment of defendant's case at some
3 point prior to the plea negotiation, defendant never claims that Attorney Serra advised him to
4 reject the plea offer.

5 *Second*, defendant's sworn statement establishes that he would not have taken the plea
6 offer at the time it was extended. Defendant states that his wife was suffering from stage four
7 cancer and that he did not want to leave her (Lepp Decl. ¶ 4). Because he did not want to be
8 imprisoned while his wife was terminally ill, he rejected the government's plea offer, which
9 would have required at least 24 months away from home. Defendant's conclusory statement in
10 his Section 2255 motion that, but for counsel's inadequate assistance, he would have accepted
11 the plea offer at the time it was extended is directly contradicted by the specific sworn facts now
12 in the record.

13 In his reply brief, defendant also claims that trial counsel — presumably Attorney
14 Hinckley — was ineffective for “failing to pursue any favorable plea agreement” with the
15 government and for failing to properly advise him regarding the possible outcome of the case
16 were defendant to proceed to trial. Defendant cites no authority establishing that a defendant has
17 a right to a plea agreement, or that counsel's failure to *seek* a plea agreement constitutes
18 defective assistance. On the facts of this case, Attorney Hinckley's decision to focus on pre-trial
19 motions and trial preparation, rather than seeking to re-open plea negotiations with the
20 government, is well within the bounds of reasonable professional assistance. Defendant rejected
21 the prior plea offer, despite the fact that his counsel at the time urged him to accept the deal.
22 Given this rejection, Attorney Hinckley may have reasonably assumed that the government
23 would not likely extend the same deal or a better offer, or that defendant would not have
24 accepted any such offer. Accordingly, defendant's claim of ineffective assistance of counsel in
25 connection with plea negotiations is **DENIED**.

26 **2. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING RFRA DEFENSE.**

27 Defendant claims that Attorney Hinckley was ineffective due to his failure to present a
28 defense under RFRA. Defendant contends that Judge Patel denied defendant's motion in limine

1 requesting leave to put on a RFRA defense for reasons that were not advanced by either party.
2 In a detailed opinion holding that a RFRA defense would not be allowed, Judge Patel first
3 assumed for the purposes of the order that defendant had established a prima facie case that his
4 religious practice was sincere, that manufacturing and possessing marijuana were tenets of the
5 Rastafarian religion, and that the CSA substantially burdened defendant's ability to practice his
6 religion (Dkt. No. 235 at 5–9). The burden then shifted to the government to demonstrate that it
7 had a compelling interest in enforcing the CSA and that the least restrictive means had been used
8 to effectuate that interest (*id.* at 9). Applying this burden-shifting analysis, Judge Patel found
9 that the concern for potential diversion of the marijuana to non-practitioners and non-medical
10 marijuana users constituted a compelling government interest in regulating defendant — in this
11 case, relevant factors included that the marijuana was grown in large fields in plain view without
12 barriers to access, the large quantity of marijuana seized, and defendant's own sale of marijuana
13 in January 2005 to an undercover officer.

14 Defendant claims that Attorney Hinckley was unprepared regarding the applicable law
15 and that counsel “failed to adequately know the available material and issues,” failed to
16 understand “how critical it was to establish that the prosecution was substantially burdening his
17 free exercise of religion,” and “failed to make meaningful objections” to Judge Patel's order
18 denying the motion in limine. Defendant further faults counsel for only “perfunctorily” raising
19 the Supreme Court's decision regarding the Controlled Substances Act in *Gonzales v. O Centro*
20 *Espirita*, 546 U.S. 416 (2006). Moreover, defendant contends that counsel did not preserve the
21 issue for appeal and failed to seek a writ of mandamus. Defendant's arguments do not establish
22 that counsel's performance was ineffective under *Strickland*.

23 Attorney Hinckley presented legal arguments and facts in support of a RFRA defense, as
24 evident from the briefs he filed in support of the motion in limine. Counsel set forth the law in
25 support of such a defense, including arguing that once an individual establishes a prima facie
26 case, the burden shifts to the government to demonstrate a compelling interest. As discussed
27 above, Judge Patel applied this burden-shifting analysis in the order denying the motion.
28 Defense counsel's briefs in support of the motion in limine discussed *Gonzales* and argued that

1 the decision stands for the proposition that the government must demonstrate, on a case-by-case
2 basis, that the prosecution of a particular defendant is the least restrictive means of serving a
3 compelling governmental interest (*see* Dkt. No. 216 at 11). Moreover, following the order
4 denying the motion, Attorney Hinckley filed a motion for reconsideration attaching declarations
5 from defendant and Erica Womachka in support of defendant's claim that there were 2500
6 individual church members, each of whom was responsible for his or her own plot and the plants
7 grown thereon (Dkt. No. 236). Defendant has set forth no specific facts or arguments that
8 defense counsel should have but failed to raise; instead he merely quarrels with the outcome.
9 *See, e.g., Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011). That Judge Patel decided
10 against defendant does not, by itself, establish that counsel's performance was deficient.

11 Contrary to defendant's assertion, the issue was preserved for and raised on appeal. Our
12 court of appeals upheld the district court's order, stating that "[a]pplying the criminal laws
13 prohibiting possession and manufacture of marijuana to Lepp is the least restrictive means of
14 furthering the government's compelling interest in preventing diversion of sacramental
15 marijuana to nonreligious users." *Lepp*, 446 Fed. Appx. at 46.

16 Defendant also contends that Attorney Hinckley's performance was deficient in failing to
17 seek a writ of mandamus regarding the Judge Patel's order denying the RFRA motion in limine.
18 On appeal, our court of appeals affirmed Judge Patel's determination. Defendant then sought a
19 writ of certiorari from the United States Supreme Court, which denied the request. Defendant
20 cannot, therefore, demonstrate a reasonable probability that the outcome would have been
21 different had Attorney Hinckley sought a writ of mandamus.

22 **3. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
23 **OUTRAGEOUS GOVERNMENT CONDUCT.**

24 Defendant argues that defense counsel was ineffective for failing to investigate and
25 research a motion to dismiss the indictment based on the government's "outrageous scheme to
26 entice [defendant] into selling marijuana to a government agent." Here too defendant sets forth
27 no specific facts or arguments that defense counsel should have but failed to raise. Defendant
28 contends generally that counsel: (1) failed to investigate and present evidence regarding

1 defendant's "well documented" mental disabilities, (2) failed to understand and argue applicable
2 law, and (3) failed to preserve the issue for appeal.

3 Attorney Hinckley filed a motion to dismiss the indictment based on outrageous
4 government conduct, arguing that the government concocted and executed a scheme to lure
5 defendant into selling marijuana to an undercover government agent. In addition to arguing the
6 relevant law, the motion raised the issue of defendant's mental frailty, stating that:

7 [B]y the time the government chose to conduct its sting Mr.
8 Lepp's mental illness was no secret. The fact that Mr Lepp was
9 a fully disabled Vietnam veteran suffering from PTSD has been
10 disclosed in many contexts. This illness, which manifests itself
11 by causing difficulty concentrating, paranoia, and a heightened
12 sustained level of fear, clearly made Mr. Lepp particularly
13 vulnerable to the chosen ruse of offering him secret unprovided
14 government photos which may be helpful in his pending federal
15 criminal prosecution. See e.g., National Center for PTSD @
16 ncptsd.va.gov.

17 (Dkt. No. 198 at 6). Judge Patel's order denying the motion to dismiss specifically addressed
18 defendant's claim that the government targeted his mental and/or physical weaknesses (Dkt. No.
19 207 at 25). Thus, evidence regarding defendant's alleged disabilities was adequately presented
20 to the court, which fully considered — and rejected — defendant's argument. Furthermore, the
21 motion to dismiss cited and discussed relevant law and decisions from our court of appeals.
22 Defendant does not point to any relevant law or decisions that counsel should have, but did not
23 bring to the court's attention, much less establish that defendant was prejudiced by any such
24 alleged failure.

25 On direct appeal, our court of appeals upheld Judge Patel's order, stating:

26 The district court did not err in denying Lepp's motion to
27 dismiss the indictment for outrageous government conduct.
28 The government's conduct during the 2005 sting operation did
not rise to the "extremely high" level of offensiveness required
to constitute a due process violation.

Lepp, 446 Fed. Appx. at 46. Accordingly, defendant's contention that defense counsel failed to
preserve the issue for appeal is incorrect.

1 **4. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
2 **PHYSICAL DISABILITY EVIDENCE.**

3 Defendant contends that trial counsel was ineffective because he failed to present
4 evidence of defendant's physical disabilities that "prevented him from actively participating in
5 the cultivation of marijuana." Defendant claims that counsel should have obtained defendant's
6 medical records and a medical expert to establish that defendant was unable to physically
7 cultivate the marijuana at issue.

8 Before the jury, defendant testified several times that he was disabled or handicapped
9 (*see* Dkt. No. 246 at 356–57, 366–67). To the extent that evidence regarding defendant's
10 physical limitations had any relevance, it was adequately presented to the jury. Defendant also
11 repeatedly denied having any role in the cultivation of the marijuana. He testified that he did not
12 plant, tend, or harvest the plants and had no involvement other than allowing others to use his
13 land (*id.* at 351, 356). He claimed, however, that he felt "responsible for all the plants" and that
14 he was "very proud" of the marijuana. Smiley Harris testified that defendant merely allowed Mr.
15 Harris' parishioners to plant marijuana on defendant's land, but that defendant did not himself
16 direct or participate in the planting, growing, or harvesting of those plants (*id.* at 319–20).

17 Defendant cannot establish he was prejudiced by defense counsel's failure to present
18 additional evidence regarding defendant's disabilities. Based on the evidence presented at trial
19 regarding defendant's involvement in marijuana cultivation, or lack thereof, any additional
20 evidence regarding defendant's physical limitations would merely be cumulative. More to the
21 point, defendant's alleged inability to physically participate in the cultivation of the marijuana
22 would not present a defense to the offenses charged. As to the offense of distribution and
23 possession with intent to distribute marijuana, and as Judge Patel instructed the jury prior to
24 deliberations, the elements of the offense are that defendant knowingly possessed marijuana and
25 that defendant possessed it with the intent to distribute it to another person (Dkt. No. 251 at 30).
26 As to the offense of conspiracy with intent to distribute marijuana, and as the jury was instructed,
27 the elements are that there was an agreement between two or more persons to commit the offense
28 of possession with intent to distribute marijuana and that defendant became a member of the
conspiracy knowing of its purpose and intending to help accomplish that purpose. *Id.* at 27.

1 Defendant's physical participation in the cultivation of the marijuana was not required to prove
2 the offense, and such evidence, even if credible, would not have provided a defense to either
3 offense charged at trial. Thus, defendant cannot demonstrate a "reasonable probability" that the
4 outcome would have been different but for counsel's allegedly ineffective assistance.

5 **5. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
6 **EVIDENCE THAT OTHER INDIVIDUALS OWNED THE PLANTS AT ISSUE.**

7 Defendant contends that counsel was ineffective for failing to present evidence that
8 individual parishioners, not defendant, were responsible for their own plants. Defendant admits
9 that counsel did introduce evidence that there were 2500 individuals who were members of
10 defendant's church between 1999 and 2008. Defendant argues that counsel failed to present
11 evidence to establish that "the plants were each property of specific parishioners" and that
12 defendant's disabilities precluded him from cultivating the marijuana. Defendant contends that
13 counsel further failed to interview and call as witnesses at trial two unnamed "alleged
14 eyewitnesses."

15 Defendant's assertion that defense counsel did not investigate or present evidence
16 regarding the members of defendant's church is contradicted by the record. As discussed above,
17 Attorney Hinckley filed a motion for reconsideration of the order denying the motion in limine to
18 present a RFRA defense. The motion attached declarations from defendant and Erica
19 Womachka in support of defendant's claim that there were 2500 individual church members.
20 The motion advanced the same argument that defendant now claims Attorney Hinckley failed to
21 investigate, namely that the plants were grown by and were the property of each individual
22 parishioner (Dkt. No. 236).

23 Furthermore, Attorney Hinckley sought to advance this same argument at trial. As stated
24 by Attorney Hinckley in his opening statement to the jury, defendant did not own the marijuana
25 but instead merely allowed his parishioners to grow marijuana on his land (Dkt. No. 245 at
26 214). Attorney Hinckley called Smiley Harris as a witness, who testified that he had an
27 agreement with defendant to allow Mr. Harris' church to grow 250 marijuana plants on
28 defendant's land. Mr. Harris testified that defendant only provided the land and did not direct or
participate in the planting, growing, or harvesting of those plants (Dkt. No. 246 at 319–20).

1 Defendant himself testified that he allowed medicinal marijuana patients and members of his
2 church to grow marijuana on his land and that he had no role in the cultivation.

3 Defendant does not provide the identity of the two witnesses Attorney Hinckley allegedly
4 failed to interview or what relevant, admissible information they would have offered had they
5 testified at trial. Based on defendant's motion, however, it appears that defendant contends the
6 witnesses would have testified that individual parishioners were responsible for the plants on
7 their plots of land and that defendant did not participate in the marijuana cultivation. This
8 evidence, to the extent it had any relevance, was in fact presented in Mr. Harris' and defendant's
9 testimony. The additional evidence defendant now alludes to would be merely cumulative of
10 other evidence presented at trial. Accordingly, defendant cannot demonstrate a reasonable
11 probability that the outcome would have been different but for counsel's allegedly deficient
12 performance.

13 **6. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
14 **FAILURE TO DEPOSE DEFENDANT'S WIFE.**

15 Defendant claims that counsel was ineffective because he failed to ensure that the
16 government depose his wife, Linda Senti, prior to her death. According to defendant, at some
17 point Judge Patel ordered the government to do so. Neither party, however, took the deposition,
18 so there was no testimony from Ms. Senti presented at trial. Defendant contends that, even if the
19 government had not deposed Ms. Senti, Attorney Hinckley should have done so. Testimony
20 from Ms. Senti would have established that: (1) Ms. Senti was the "organizer/supervisor with
21 respect to the cultivation of marijuana," (2) defendant's disabilities prevented him from
22 cultivating large amounts of marijuana plants, (3) parishioners of defendant's church each owned
23 specific plants, and (4) defendant was not responsible for oversight of the church business,
24 including record-keeping.

25 *First*, as the Seventh Circuit aptly observed, "[j]udges are not like pigs, hunting for
26 truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). So too
27 here. Defendant has not identified any order, written or oral, for this Court to evaluate
28 defendant's claim that Judge Patel "clearly directed the Government to take a video deposition of
defendant's wife, Linda Senti, before she passed away" (Reply 34). The government asserts

1 that, after a diligent review of the record, it was unable to find any such order. This Court does
2 not have the resources to sift through each transcript, minute entry, and order in an effort to
3 locate the alleged order.

4 *Second*, even if there was such an order requiring the government to take Ms. Senti's
5 deposition, defendant cannot demonstrate prejudice as a result of counsel's failure to ensure that
6 her testimony was preserved for trial. As to any testimony regarding defendant's disabilities and
7 the ownership of the plants by individual parishioners, those issues have been addressed above.
8 Ms. Senti's potential testimony regarding her role as the organizer or supervisor of the marijuana
9 cultivation would at most have corroborated defendant's testimony at trial that "my wife, Linda,
10 was in charge of the field . . . I stayed in the offices as was indicated by Mr. Smiley [Harris]"
11 (Dkt. No. 246 at 393). Defendant also testified that "if there was a boss of anything — anyone
12 that knows this ministry knows — until the day she died, it was my wife" (*id.* at 355). The fact
13 that Ms. Senti was also involved in the marijuana cultivation would not have provided a defense
14 to the two offenses charged at trial. Defendant's own statements established that he was a leader
15 of his church, which was named after him. He testified that as leader and founder of the church,
16 he felt "responsible for all the plants" and was proud of the marijuana cultivation (*id.* at 376–77).
17 Even if Ms. Senti was also involved in record-keeping and business arrangements of the
18 marijuana cultivation, such evidence would not have provided a defense to liability nor have
19 established that defendant was thereby eligible for safety-valve relief, as discussed below.
20 Accordingly, defendant cannot establish that he was prejudiced by counsel's allegedly deficient
21 performance in failing to ensure that Ms. Senti's deposition was taken and presented at trial.

22 **7. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
23 **FAILURE TO OBJECT TO ADMISSION OF EVIDENCE.**

24 Defendant contends that counsel was ineffective in "failing to investigate and make
25 meaningful objections," which allowed prejudicial testimony to be presented at trial.
26 Specifically, defendant contends that defendant's counsel "opened the door" to evidence
27 regarding the 2005 sale of marijuana to an undercover agent that had previously been suppressed
28 on *Massiah* grounds. Defendant claims that Attorney Hinckley was ineffective because he: (1)
opened the door to such evidence through his questioning of defendant and (2) did not "oppose

1 cross-examination and presentation of evidence on this issue.” As to the latter claim, defendant
2 argues that Attorney Hinckley neglected to investigate and argue facts “demonstrating
3 [defendant] had not ‘opened the door’ on his direct testimony.”

4 On direct examination, Attorney Hinckley asked questions eliciting testimony regarding
5 defendant’s acquisition of the property, his church and religious beliefs, his religious and
6 medical use of marijuana, the cultivation of marijuana on the property, defendant’s regular
7 notifications to local authorities and law enforcement regarding growing of marijuana for
8 medicinal and sacramental purposes, the 2004 entry by Officer Garzoli and other local law
9 enforcement officers onto his property and defendant’s statements to the officers, defendant’s
10 disabilities and lack of involvement in the cultivation of the plants, and defendant’s feeling of
11 responsibility for the plants as leader and founder of the church. Defendant testified that he did
12 not participate in the cultivation at all and did not direct or assist in the operation. Defendant
13 testified that he was proud that he could offer this service to people, providing “safe, affordable
14 access to our medicine in a centralized location, with an open offer to the police to come and
15 inspect it at any time” (Dkt. No. 246 at 357–58).

16 Following this direct examination, the government sought to introduce evidence
17 regarding the 2005 sale of marijuana to an undercover agent. Out of the presence of the jury,
18 counsel for the government argued that defendant’s testimony had opened the door to the
19 admission of this evidence. Specifically, the government argued that the overall tenor of
20 defendant’s testimony, rather than any specific question, was inconsistent with the sale.
21 Attorney Hinckley disputed this, arguing that the 2005 sale was not related to defendant’s
22 testimony regarding allowing others to grow marijuana on his property in 2004. Defendant had
23 not testified, for example, that he had never made any sales, a statement which would be
24 inconsistent with the 2005 sale to an undercover agent.

25 Defendant now argues this same point in his Section 2255 motion. He claims that the
26 evidence regarding the sale was unrelated to defendant’s testimony, which related to the plants
27 seized from defendant’s property in 2004 and the ownership and cultivation of those plants.
28 Attorney Hinckley did, in fact, raise this argument, which Judge Patel rejected.

1 Defendant also contends that, although he testified as to the plants on the “rural property”
2 (the fields on the property), he never claimed that the plants, dried marijuana, and marijuana-
3 related paraphernalia seized from his residential property were not his. Defendant argues that
4 this information should have been provided to the trial court. Even if it were true that defendant
5 never denied ownership of marijuana from his residential property, this distinction would not
6 have been relevant to Judge Patel’s ruling allowing the evidence to be presented. Judge Patel
7 overruled defense counsel’s objection, stating that the 2005 sale was “inconsistent with the . . .
8 overall tenor of his testimony, and what [defendant] says he does, and who he is” (*id.* at
9 372). Defense counsel’s decision to argue that defendant’s testimony on direct examination was
10 not inconsistent — without raising this point regarding defendant’s control and ownership over
11 other marijuana and paraphernalia — was a reasonable tactical decision and certainly one that
12 fell within the wide range of acceptable professional representation.

13 In his reply brief, defendant appears to abandon his contention that defense counsel’s
14 objections were inadequate, and instead claims that counsel improperly elicited testimony from
15 defendant that allowed the government to successfully argue that the testimony opened the door
16 to evidence of the 2005 sale. Defendant does not identify any particular question or line of
17 questions that he contends defense counsel should not have asked. As discussed above, Attorney
18 Hinckley elicited testimony that generally supported defendant’s theory of the case regarding his
19 allegedly compassionate and religious mission and his lack of ownership or direct involvement
20 in the marijuana cultivation. Elsewhere in his Section 2255 motion, defendant lambasts
21 Attorney Hinckley for failing to present even more evidence in this vein, such as further
22 evidence regarding defendant’s disabilities, the 2500 individuals growing marijuana on his
23 property and their ownership of the plants, and the involvement of defendant’s wife in the
24 cultivation of the marijuana. Defendant’s vague and conclusory allegations that defense counsel
25 elicited improper testimony are insufficient to warrant habeas relief. *See Borg*, 24 F.3d at 26.

26 **8. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING**
27 **APPLICABILITY OF SAFETY-VALVE PROVISION.**

28 Defendant contends that defense counsel was ineffective in failing to present evidence
that defendant claims would establish his eligibility for a reduced sentence pursuant to the

1 safety-valve provision of 18 U.S.C. Section 3553(f). Under this provision, a sentencing judge
2 can depart from the mandatory minimum sentence if he or she determines that the offender
3 “played a minor role in the offense and . . . ‘made a good-faith effort to cooperate with the
4 government.’” *United States v. Sherpa*, 110 F.3d 656, 660 (9th Cir. 1996) (quoting *United*
5 *States v. Ajugwo*, 82 F.3d 925, 926 (9th Cir. 1996)). Defendant contends that defense counsel
6 failed to establish each of the requisite elements for eligibility. Specifically, defendant claims
7 that, following the jury’s verdict but prior to sentencing, defendant met with counsel for the
8 government and a DEA agent. Attorney Hinckley was present at this meeting. Defendant was
9 told that if he “recanted his testimony” and claimed he was the leader or organizer, the
10 government would support applying the safety-valve provision. Believing he had testified
11 truthfully at trial, however, defendant refused to modify his testimony and refused to admit that
12 he was the leader or organizer of others in the charged offenses (Mot. 18).

13 The parties both discussed the applicability of the safety-valve provision in their
14 sentencing memoranda, filed prior to the sentencing hearing. The basic facts of the meeting are
15 not in dispute, and are generally in accord with defendant’s characterization. The arguments
16 presented by the government in its sentencing memorandum were that: (1) defendant had not
17 been truthful, in that he stood by his trial testimony which the jury’s verdict had necessarily
18 determined was false, and (2) defendant was an organizer or leader in the conduct charged.
19 Defense counsel’s sentencing memorandum and reply brief contended that the defense’s theory,
20 as argued to the jury, was that the government “had not met its burden of proving that
21 [defendant]’s conduct was sufficient to meet the definition of conspiring and possessing the
22 marijuana in the field since he did not personally grow it and did not personally own it” (Dkt.
23 No. 276 at 3). While the jury found otherwise, the verdict did not require or imply that the jury
24 had determined that defendant had lied. Defense counsel further argued that defendant’s conduct
25 did not establish that he was a leader or organizer, where “there [was] insufficient evidence that
26 [defendant] exercised control and authority” over others who actually planted and cultivated the
27 marijuana (*id.* at 4).

1 At the sentencing hearing, the issue of safety-valve relief based on defendant's
2 truthfulness and level of involvement was argued before Judge Patel (Dkt. No. 297 at 7–16).
3 The meeting regarding “recanting” defendant’s trial testimony was again raised by both parties.
4 The sentencing judge was well-apprised of the issues, both factual and legal, prior to ruling that
5 the safety-valve provision was inapplicable. Judge Patel’s denial of safety-valve relief was
6 based in part on the fact that defendant had not been fully candid with the court over the long
7 course of the case, as well as on defendant’s own statements that, as leader of the church, he felt
8 responsible for the marijuana plants. As discussed above, our court of appeals affirmed the
9 sentence, holding that Judge Patel did not err in finding that defendant “failed to show by a
10 preponderance of the evidence that he was entitled to safety-valve relief under 18 U.S.C.
11 3553(f).” *Lepp*, 446 Fed. App’x at 47.

12 Defendant cannot establish that Attorney Hinckley’s representation “fell below an
13 objective standard of reasonableness” under the performance prong of *Strickland*. Defense
14 counsel argued in two briefs and at the sentencing hearing that the safety-valve provision should
15 apply, and refuted the government’s arguments regarding whether defendant’s refusal to “recant”
16 his testimony at the meeting rendered defendant ineligible. That Judge Patel did not agree with
17 defendant does not establish that defense counsel’s performance was unreasonable.

18 In his reply brief, defendant contends for the first time that counsel was also deficient in
19 failing to inform defendant that if he admitted to being a leader or organizer, he would have been
20 precluded from obtaining safety-valve relief. As discussed above, however, defendant stated
21 that at the meeting, he refused to admit that he was a leader or organizer. Therefore, defendant
22 cannot claim to have been prejudiced by counsel’s alleged failure to tell him that so admitting
23 would preclude safety-valve relief.

24 **9. CUMULATIVE ERRORS OF COUNSEL.**

25 “[A] court may find unfairness — and thus prejudice — from the totality of counsel’s
26 errors and omissions.” *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983). In evaluating
27 defendant’s claim, the question is whether the “multiple deficiencies have the cumulative effect
28 of denying a fair trial to the petitioner” *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir.

1 1979). Defendant contends that the eight alleged errors discussed above rendered his defense
2 counsel deficient and prejudicial. Having considered each of these claims in turn, and finding
3 each claim insufficient, this order concludes that defendant has also failed to establish that he
4 was cumulatively prejudiced by counsel's alleged acts and omissions during trial and pre-trial
5 proceedings. Defendant is unable to proffer any evidence that the cumulative effect of counsel's
6 alleged errors was prejudicial. Such failure to prove prejudice is dispositive on a claim of
7 ineffective assistance of counsel.

8 **10. DOUBLE JEOPARDY CLAIM.**

9 Defendant contends that his convictions violate the double jeopardy clause of the Fifth
10 Amendment. As discussed above, defendant was tried and convicted on (1) one count of
11 conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. 846 and (2)
12 one count of manufacture and possession with intent to distribute marijuana in violation of 21
13 U.S.C. 841(a)(1). The jury returned a verdict of guilty as to both counts, further finding that the
14 offense in each count involved 1,000 or more marijuana plants.

15 The government contends that defendant's claim is procedurally defaulted, as defendant
16 failed to raise the claim before the trial court or on direct appeal. *See United States v. Withers*,
17 638 F.3d 1055, 1064 (9th Cir. 2011). Absent a showing of cause and prejudice or actual
18 innocence, defendant is procedurally barred from raising a defaulted claim in a Section 2255
19 motion. *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003).

20 Even if defendant were able to overcome the procedural bar, however, the claim is
21 without merit. It has long been established that a "substantive crime and a conspiracy to commit
22 that crime are not the same offense for double jeopardy purposes." *United States v. Saccoccia*,
23 18 F.3d 795, 798 (9th Cir. 1994) (citing *United States v. Felix*, 503 U.S. 378, 389 (1992)); *see*
24 *also, United States v. Wylie*, 625 F.2d 1371, 1381–82 (9th Cir. 1980). Two counts within an
25 indictment are not duplicative for purposes of the Fifth Amendment if "each separately violated
26 statutory provision requires proof of an additional fact which the other does not." *United States*
27 *v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005). Conspiracy requires proof of an agreement
28 between two or more persons (here, to possess with intent to distribute and distribute marijuana),

1 as well as defendant's joining in the agreement knowing of its purpose and intending to help
2 accomplish that purpose. In comparison, the offense of distribution and possession with intent to
3 distribute marijuana are that defendant knowingly possessed marijuana and that defendant
4 possessed it with the intent to distribute it to another person. Therefore, the conspiracy count
5 required proof of additional facts not required by the possession and distribution count, and vice
6 versa.

7 Defendant further appears to argue that it is unconstitutional to charge and convict him
8 for offenses involving 1,000 or more marijuana plants, as the phrase "or more" is ambiguous.
9 Defendant contends that at sentencing, approximately 25,000 plants were attributed to him.
10 Therefore, the prohibition against double jeopardy and the rule of lenity require that the
11 ambiguity be resolved in favor of defendant. Defendant's argument is not supported by any
12 authority, nor does it make any logical sense. The fact that the quantity charged was stated as
13 "1,000 plants or more" does not render the charge constitutionally ambiguous. Moreover,
14 defendant has not demonstrated prejudice. Defendant was sentenced to a ten-year term of
15 imprisonment — the mandatory minimum for an offense involving at least 1,000 marijuana
16 plants. *See* 18 U.S.C. 841(b)(1)(A)(vii). Defendant's contention that he was in fact sentenced
17 based on approximately 25,000 plants is irrelevant, as the sentence imposed was based on the
18 ten-year mandatory minimum provided for an offense involving at least 1,000 marijuana plants.
19 And, as discussed above, the evidence at trial was more than sufficient to support the jury's
20 special finding that the counts involved 1,000 or more marijuana plants, as the parties stipulated
21 that the number of marijuana plants was 24,784.

22 **11. MOTION SEEKING LEAVE TO AMEND TO INCLUDE ADDITIONAL CLAIM**
23 **FOR VIOLATION OF EQUAL PROTECTION.**

24 On January 12, over two months after filing his original Section 2255 motion, defendant
25 filed a motion seeking leave to amend his Section 2255 motion to add an additional claim.
26 Defendant contends that he "has discovered important and relevant information and
27 documentation" justifying the addition of this new claim. Defendant appears to argue that his
28 conviction is unconstitutional because marijuana should be legal, or because it is a violation of
equal protection for the federal government to prosecute him for marijuana possession, where the

1 states of California, Colorado, and Washington have decriminalized marijuana for medicinal
2 and/or recreational purposes (see Dkt. No. 355). Even assuming such an amendment would be
3 proper and timely under the applicable rules, amendment would be futile. Accordingly, the
4 motion for leave to amend is **DENIED**.

5 Rule 12 of the Rules Governing Section 2255 Motions provides that the Federal Rules of
6 Civil Procedure may be applied to Section 2255 motions when appropriate. Our court of appeals
7 has stated that:

8 In assessing the propriety of a motion for leave to amend, we
9 consider five factors: (1) bad faith; (2) undue delay; (3)
10 prejudice to the opposing party; (4) futility of amendment; and
11 (5) whether the plaintiff has previously amended his complaint.
Futility alone can justify the denial of a motion for leave to
amend.

12 *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004) (internal citations omitted). Here, granting
13 leave to amend would be futile. Defendant's proposed new claim rests on his contention that
14 marijuana has been misclassified under the Controlled Substance Act and that the federal
15 prohibition against marijuana, which is allowed by state law, is discriminatory. Defendant's
16 equal protection challenge to the classification of marijuana as a Schedule I drug under the Act is
17 contrary to the Supreme Court's holding in *Gonzalez v. Raich*, 545 U.S. 1, 9 (2005). In *Raich*,
18 the Supreme Court upheld the constitutionality of the CSA and Congress' classification of
19 marijuana as a Schedule I drug. Defendant has not met his burden of establishing that no
20 rational basis exists to justify the classification of marijuana under the CSA. Nor has defendant
21 set forth any evidence in support of his selective prosecution argument that would establish that
22 individuals in California, Washington, and Colorado are not, in fact, being prosecuted by the
23 federal government for violations of the CSA's prohibition on marijuana. See, e.g., *Sacramento*
24 *Nonprofit Collective v. Holder*, 855 F.Supp.2d 1100, 1110 (E.D. Cal. 2012) (finding that the
25 federal government has enforced the CSA against medical marijuana patients and dispensaries in
26 California and Colorado). Accordingly, for the reasons stated above, defendant's motion for
27 leave to amend is **DENIED**.
28

CONCLUSION

For the foregoing reasons, defendant's sentence was not "imposed in violation of the Constitution or laws of the United States, or . . . without jurisdiction . . . , or . . . in excess of the maximum authorized by law," and is not "otherwise subject to collateral attack." 28 U.S.C. 2255(a). Therefore, defendant's motion is **DENIED**.

IT IS SO ORDERED.

Dated: April 9, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE